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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. HAMIDULLAH SARWARY, Defendant and Appellant.	2d Crim. No. B286186 (Super. Ct. No. 1442831) (Santa Barbara County)

A jury found Hamidullah Sarwary guilty of sexual penetration of an intoxicated person (Pen. Code, § 289, subd. (e))[1]; rape of an intoxicated person (§ 261, subd. (a)(3)); and assault with intent to commit rape of an intoxicated person (§ 220, subd. (a)(1)). The trial court sentenced Sarwary to six years each on the penetration and rape counts, for a total of 12 years. Sentence on the assault count was stayed pursuant to section 654. We affirm.

[1] All statutory references are to the Penal Code unless otherwise stated.

FACTS

In July 2013 C. had just turned 21 years old. She lived in an apartment in Santa Barbara. On July 31 she went out for dinner and drinks with a roommate. By the time they left the second establishment, C. was intoxicated. At the third establishment, Tonic Nightclub (Tonic), C. met her friend, Michele Rock. C. passed out at Tonic. The bouncer told Rock that C. was too intoxicated and needed to go home. Rock called a cab. A minivan cab driven by a Middle Eastern man arrived, and C. got in the back seat. Rock gave the driver $20 and told him to get C. home safely.

The next thing C. remembered was that she was in the middle row of the cab with her leggings and underwear down. A man with a beard was moving his fingers in and out of her vagina. She slapped the man's hand away and said, "What the fuck are you doing?" She tried to climb into the back seat. The man grabbed her by the ankle and said, "Come on, don't be like that." C. felt "really drunk," and it was hard for her to hold up her head. She blacked out.

C. awoke in her apartment at about 9:00 a.m. She told her roommate that she thought she had been sexually assaulted by the cab driver. She was traumatized, hyperventilating, and crying. She said she was not trying to flirt with the cab driver, and told him to stop. Her vagina was sore.

C. exchanged text messages with a friend. The friend advised her not to shower or wash her clothes, and to report the rape to the women's center. C. contacted the Rape Crisis Center. They took her to the hospital for a SART exam.

C. told the nurses she had been assaulted by a Middle Eastern cab driver who was approximately 40 years old. The

nurses took swabs of C.'s mouth, vagina, breast, neck, and labia. There was semen inside her vagina. She had vaginal discomfort. DNA samples taken from C.'s neck and breast matched Sarwary's DNA. Sarwary's DNA was consistent with a partial profile taken from the vaginal swab.

Santa Barbara Police Officer Cynthia Carter and Detective Douglas Klug contacted C. at the Rape Crisis Center. Klug asked to look at C.'s cell phone. On August 1, 2013, C. sent a text message to Sarwary's cell phone that read, "HDNNSF." C. did not remember sending the text message. Sarwary sent C. a text message that afternoon, "Hi, how are you." C. replied, "Who is this[?]" Sarwary replied, "This is Hamid." C. did not recognize the phone number. Later Sarwary sent another text message asking C. to meet him to talk.

Police Detective Charles Katsapis was assigned to investigate. Katsapis traced the phone number on C.'s phone to a taxicab driver named Hamid.

Katsapis asked C. to make a pretext phone call. C. told Sarwary that she needed to know what happened. Sarwary said he remembered picking her up from Tonic. She told him to go to a park by her house. He said she told him she did not want to go home with him because he is a foreigner. C. said she remembered Sarwary touching her. Sarwary replied, "Yeah and then you were calling me that I'm weak." C. asked Sarwary if he touched her. He replied, "Well I don't know if we touched but I think you only kissed me and stuff but then we just uh you know." C. said she remembers her pants being down and Sarwary touching her vagina. Sarwary said she went into the park and urinated. Sarwary admitted he knew she was "really, really drunk."

C. asked Sarwary if his hands were "down there." He said he did not remember exactly what happened. She said she remembers her pants being down and his fingers inside her. She asked why he touched her. He replied that she was the one who kissed him first and she kept calling him a "weak man" for not doing anything more than that. C. asked again whether he touched her. Sarwary repeated that he did not remember.

The police arrested Sarwary at his home. There were two minivan taxicabs. One was registered to Sarwary and the other was registered to Karina Sarwary.

The police placed Sarwary in an interview room at the police station. Detective Katsapis told Sarwary that he had a warrant for a DNA sample. Sarwary stated that he would not give a sample until he spoke with a lawyer. The police told Sarwary that a lawyer would not help him avoid the taking of a sample, and that they would take it even if they had to physically restrain him. The police collected a sample from Sarwary's cheek. When left alone in the interview room, Sarwary wiped down a cup from which he had been drinking water.

Defense

Sarwary testified on his own behalf. He said he picked C. up at Tonic in his cab. As they got close to her apartment, she said she would take him home if he were not Middle Eastern. She directed him to a park. She was "a little bit drunk." At the park they talked and joked. C. got out of the van to urinate. She was no longer intoxicated. C. got back into the van. She started kissing him. He put his fingers inside her vagina. She did not ask him to stop. She climaxed. After C. climaxed, he got out of the cab to walk around and calm himself down. When he returned to the cab, they resumed kissing and then had

consensual sex. C. wanted him to do more, but he told her that was enough. She called him a "weak man." They exchanged phone numbers. During a subsequent phone call when C. asked if her pants were down and if he touched her vagina, he lied to her because he did not want to embarrass her.

Dr. Alan Donaldson, a consultant in toxicology and pharmacology, testified that C.'s blood-alcohol level at 1:00 a.m. would be between 0.24 and 0.27. The estimate was based on her consuming nine alcoholic beverages between 8:00 p.m. and 12:15 a.m. A person with that blood-alcohol level may be unconscious.

Dr. Carolyn Murphy, a forensic psychologist, testified that she examined Sarwary to see if he had any personality traits consistent with sexual assault. She found no such evidence.

DISCUSSION

I.

Sarwary contends the trial court erred in allowing evidence of his Colorado prior felony conviction. At a pretrial motion in limine, the People sought to introduce a Colorado felony conviction for false impersonation dated August 2, 2007. The People argued it is a crime of moral turpitude relevant to impeach Sarwary should he testify. The People pointed out that the prior conviction occurred only six years from the current offenses.

Sarwary objected under Evidence Code section 352. He argued that the offense occurred in 2005, 12 years from when he would be testifying, and that it would keep him from testifying on his own behalf.

The trial court granted the People's motion. The court found the evidence was relevant to Sarwary's credibility; that the offense occurred in his recent past, no matter from where that is

measured; that it did not substantially affect his ability to present a defense; and that its probative value outweighed the risk of undue prejudice.

Sarwary admitted the prior conviction while testifying in his defense. After the evidence was in, the People sought to admit an exhibit showing the conviction. Sarwary objected that the exhibit was cumulative. The trial court granted the People's motion subject to the redaction of irrelevant counts. The redacted exhibit was given to the jury. What was not redacted from the exhibit was the Colorado court's order requiring Sarwary to give a DNA sample.

During deliberations the jury sent a note asking for the definition of criminal impersonation in Colorado and the reason for the DNA collection in the Colorado conviction. Sarwary moved for a mistrial. The trial court denied the motion, and instructed the jury: "Mr. Sarwary was previously convicted of a crime in 2007. The victim of that crime was the housing authority. This was not a sex crime nor was it a crime against a person. When a person is convicted of a felony they are ordered to provide a DNA sample. Mr. Sarwary complied with that order in 2007. You should give no weight to the DNA testing order in that case, because it is not relevant in this case."

Evidence Code section 788 provides in part: "For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony . . . ." The admission of such evidence is subject to Evidence Code section 352. That section gives the trial court discretion to exclude evidence if its probative value is substantially outweighed by the danger of undue prejudice.

In determining whether to admit prior convictions, the trial court should consider: "'(1) [W]hether the prior conviction reflects adversely on an individual's honesty or veracity; (2) the nearness or remoteness in time of a prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what the effect will be if the defendant does not testify out of fear of being prejudiced because of impeachment by prior convictions.'" (*People v. Green* (1995) 34 Cal.App.4th 165, 182.) Sarwary challenges the exercise of the trial court's discretion as to the second and fourth factors.

Sarwary argues his prior conviction is too remote in time. He points out he committed the offense in 2005 and was convicted in 2007. He testified in this case in 2017; thus, he committed the offense 12 years prior and suffered the conviction 10 years prior.

Sarwary relies on *People v. Muldrow* (1988) 202 Cal.App.3d 636. In *Muldrow*, the defendant was convicted of first degree burglary. The burglary occurred in 1985. The trial court admitted felony convictions for automobile theft in 1965, burglary in 1972, and attempted burglary in 1975. On appeal the defendant argued that because the priors were from 10 to 20 years old, they should have been excluded. In rejecting the argument, the Court of Appeal recognized that a prior conviction should be excluded if it occurred long before and has been followed by a "legally blameless life." (*Id.* at p. 647, italics omitted.) But the court concluded that the multiple convictions showed a 20-year pattern that is relevant to the defendant's credibility. (*Id.* at p. 648.)

Sarwary suggests there is no evidence that he has not led a legally blameless life since his prior conviction. Assuming that to

be so, a period of 10 or 12 years is not so remote that it shows the trial court abused its discretion.

Sarwary argues the fourth factor, the effect of the prior conviction on the defendant's decision to testify, is also relevant. But the factor has no application where, as here, the defendant testified. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 926.)

Sarwary argues that under Evidence Code section 788, his choice to acknowledge the prior conviction during his testimony foreclosed the admission of the exhibit containing the conviction. He points out that Evidence Code section 788 is written in the disjunctive. The prior conviction may be shown "by the examination of the witness or by the record of the judgment." (*Ibid.*)

But Evidence Code section 788 is written in the disjunctive because the Legislature did not intend to require the People to prove a prior conviction by both the examination of the witness and the record of the judgment. That defendant admits to a prior conviction does not prohibit the People from introducing the judgment of conviction. (See *People v. Smithey* (1999) 20 Cal.4th 936, 973-974 [evidence not irrelevant simply because other evidence may establish the same point]; *People v. Siegel* (1934) 2 Cal.App.2d 620, 623 [defendant not prejudiced by introduction of judgment after he admitted prior conviction].)

Here, the judgment of conviction made reference to an order for a DNA test. But the trial court cured any possible prejudice by instructing the jury that the crime was not a sex crime, the victim was the housing authority, the DNA test is a matter of routine in a felony conviction, and the DNA test is not relevant to this case.

II.

Sarwary contends the trial court erred in admitting evidence of a photograph of C., his booking photograph, and C.'s conduct after the rape. The evidence was admitted over Sarwary's relevancy objections.

In pretrial motions, the People argued that the photographs of C. and Sarwary show how they looked near the time of the incident. The prosecution argued they are relevant to show that C., an attractive young woman, would not be interested in a middle-aged man. Thus, the photographs are relevant to show a lack of consent. The trial court found the photographs not relevant for that purpose.

The People then argued C.'s photograph showed that she had a distinctive area of white hair in the front of her head. It is relevant to impeach Sarwary's credibility when on the pretextual call he feigned not to remember her. The trial court found it relevant for that purpose.

Trial courts have broad discretion in the admission of evidence. (*People v. Anderson* (2001) 25 Cal.4th 543, 591.) C.'s photograph taken near the time of the rape showing a distinctive appearance is relevant to impeach Sarwary's statements indicating he did not remember her. C.'s behavior showing she was adversely affected by the incident is relevant to show she did not consent.

Sarwary's booking photograph is another matter. How Sarwary looked near the time of the offense is irrelevant because no eyewitness identified him. Deputies found Sarwary through his phone number.

In any event, even if it were error to admit C.'s and Sarwary's photographs and the evidence of C.'s conduct after the

rape, the error was harmless. Sarwary attempts to portray the trial as a matter of C.'s word against his. But that is not the case. C.'s testimony that she was highly intoxicated when she left Tonic and got into Sarwary's cab is supported by other witnesses, including her friend Rock, and Pedrote, the bouncer at Tonic. Pedrote told Rock to remove C. from the bar because C. was highly intoxicated. In fact, Sarwary admitted in a phone call that he knew C. was "really, really drunk." Sarwary's trial testimony that at the time they had sex C. was acting normal is simply not credible. His statement to C. during a phone call that he did not remember whether he put his fingers in her vagina shows a consciousness of guilt. Sarwary's trial testimony shows he remembered what happened in detail. Sarwary also admitted at trial that during the phone conversation he lied to C. about her pants being down and touching her. Those lies also show a consciousness of guilt. There is no reasonable probability that Sarwary would have obtained a more favorable result had the challenged evidence not been admitted. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

III.

Sarwary contends the trial court erred in admitting into evidence his hesitation in submitting to a DNA test.

During the ride to the police station after Sarwary's arrest, deputies informed him that they had a warrant for a DNA sample. In an interview at the police station, Sarwary stated he would not give a DNA sample until he spoke with his lawyer. Deputies told him that if he did not cooperate they would take the sample by force. Sarwary then cooperated. A video of Sarwary's time in the interview room was made. At the time the

deputies demanded the DNA sample, they had not shown Sarwary the warrant and had not informed him of the charges.

The trial court admitted testimony about Sarwary's refusal to give a DNA sample to show consciousness of guilt. The court also instructed the jury on consciousness of guilt (CALCRIM No. 371). The court ruled that the People could not play the video. Sarwary, however, elected to play the video, with his demand for an attorney redacted, to show the context of his refusal.

Sarwary concedes that in *People v. Farnam* (2002) 28 Cal.4th 107, 153 (*Farnam*), our Supreme Court held that the defendant's refusal to provide a court-ordered exemplar is admissible evidence of the defendant's consciousness of guilt.

In *Farnam*, *supra*, 28 Cal.4th 107, the defendant was a suspect in the murder of Lillian Mar. He was in prison on a different offense. A detective went to the prison and informed the defendant he had a warrant for hair and blood samples. The detective did not inform the defendant that the warrant related to the Mar murder, but gave the defendant his card showing him to be from the robbery/homicide division of the Los Angeles Police Department. The defendant refused to cooperate and took a fighting stance before ultimately agreeing to provide samples.

Sarwary attempts to distinguish *Farnam* on the grounds that he was not told why he was arrested, that he was never shown a copy of the warrant, and that he never took a fighting stance or was aggressive in any manner. But in *Farnam*, the defendant was not told what the samples were for and the facts do not state he was shown a copy of the warrant. The only difference is that here Sarwary did not take a fighting stance. In any event, Sarwary did, in fact, refuse to give a DNA sample.

The factors argued by Sarwary go to the weight of the evidence, not its admissibility.

Sarwary argues the admission of the evidence violated the holding of the United States Supreme Court in *Doyle v. Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91]. *Doyle* prohibits the prosecution from impeaching a defendant's trial testimony with evidence of the defendant's silence after he invokes his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694]. Sarwary points out that he demanded an attorney before agreeing to give a DNA sample.

But *Miranda* involves an in-custody interrogation by the police. Here the police were not interrogating Sarwary; they were demanding that he comply with a court order to give a DNA sample. Sarwary cites no authority that he has a right to an attorney before complying with a court order for an exemplar. *Doyle* does not apply here.

IV.

Sarwary contends the trial court erred in disallowing his expert Dr. Murphy's testimony about certain information she relied on in formulating her opinion.

The trial court sustained hearsay objections to Murphy's testimony about what Sarwary told her and about what one male and two female prior customers said to a defense investigator praising Sarwary's taxi service. Sarwary argues the statements were admissible because an expert based her opinion on them. But those statements are precisely the type of case-specific hearsay our Supreme Court ruled inadmissible in *People v. Sanchez* (2016) 63 Cal.4th 665, 686.

Sarwary argues his statements to Murphy were admissible as prior consistent statements under Evidence Code sections 791

and 1236. He points out that the People attacked his credibility at trial. But Sarwary failed to preserve the claim by not raising it at trial. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.) Moreover, a prior consistent statement may not be admitted to rehabilitate a witness when the statement was made after an improper motive is alleged to have arisen. (*People v. Gentry* (1969) 270 Cal.App.2d 462, 473.) Any statements made by Sarwary to Murphy were made well after an improper motive arose.

V.

Sarwary contends his conviction for assault with intent to commit rape must be reversed because it is a lesser-included offense of rape.

But the rape and assault with intent to commit rape were based on two separate acts. The prosecutor told the jury that the assault occurred when Sarwary grabbed C.'s ankle as she tried to get into the back seat of the cab. Nor is a unanimity instruction required, where, as here, the prosecutor informs the jury of the specific act on which the charge is based. (*People v. Hawkins* (2002) 98 Cal.App.4th 1428, 1455.)

VI.

Sarwary contends the trial court erred in imposing consecutive sentences for sexual penetration of an intoxicated person and rape of an intoxicated person.

Section 667.6, subdivision (c) gives the trial court the discretion to impose a consecutive term "for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion. A term may be imposed consecutively pursuant to this subdivision if a person is convicted of at least one offense specified in subdivision (e)." Rape of an

intoxicated person (§ 261, subd. (a)(3)) is an offense specified in subdivision (e).

Section 667.6, subdivision (d) mandates the imposition of a consecutive term "for each violation of an offense specified in subdivision (e) if the crimes involve separate victims or involve the same victim on separate occasions. [¶] In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions."

Here, the trial court stated at sentencing: "If the crimes were committed against a single victim the sentence judge may determine whether the crimes were committed on separate occasions. In determining whether they are separate occasions the sentencing judge must consider whether between the commission of one sex crime and another the defendant had a reasonable opportunity to reflect on his or her actions and nevertheless resumed sexually assaultive behavior. The full, separate, and consecutive terms must be imposed for each violent sex offense committed on separate occasions under 667.6 (c). [¶] The testimony provided demonstrated that the acts were separate. There was ample time to reflect on the actions in this case. They were completely separate sex acts. The time as indicated by the defendant during his testimony, and so,

therefore, the Court finds that full, separate, and consecutive terms must be imposed."

The trial court cited section 667.6, subdivision (c), conferring discretion to impose consecutive sentences. But in stating, "consecutive terms must be imposed," it appears the trial court was sentencing Sarwary under the mandatory provisions of section 667.6, subdivision (d). The trial court's statement shows that it was well aware that it must find the defendant had a reasonable opportunity to reflect on his actions and nevertheless resumed his sexually assaultive behavior.

The trial court's finding is supported by substantial evidence. Sarwary testified that when he put his fingers in C.'s vagina, she did not ask him to remove them. Instead, she climaxed. He said after she climaxed, "I needed to take a break, you know, kind of calm myself down." He said they sat next to each other for two or three minutes. Then he left the cab to take a walk outside to calm himself down. He said after he returned to the cab they kissed for a few minutes, "Then somehow we had sex." Sarwary had ample opportunity to reflect on his actions before returning to his cab and raping C.

Sarwary's reliance on *People v. Corona* (1988) 206 Cal.App.3d 13 is misplaced. In *Corona*, the defendant put his fingers in the victim's vagina, kissed her genitals, and then raped her, without a significant interval between those acts. He left and returned five minutes later and raped her again. The trial court imposed full consecutive sentences for each of the four sex offenses under section 667.6, subdivision (d). The Court of Appeal concluded that the first three offenses occurred on a single occasion. But the second rape, occurring after a five-

minute interval, qualified as a separate offense under section 667.6, subdivision (d). (*Corona*, at pp. 17-18.)

In this case, the rape was like the second rape in *Corona*. There was a significant interval between Sarwary's act of placing his fingers inside C.'s vagina and the rape.

Sarwary's reliance on *People v. Pena* (1992) 7 Cal.App.4th 1294 is also misplaced. In *Pena*, the Court of Appeal concluded the trial court erred in imposing consecutive sentences for forcible oral copulation and rape under section 667.6, subdivision (d). Both acts were part of an uninterrupted sequence of events. (*Pena*, at pp. 1313-1314.) Here, there was a significant interruption between the offenses.

There is no cumulative error requiring reversal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

TANGEMAN, J.

Michael J. Carrozzo, Judge

Superior Court County of Santa Barbara

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